

## **Before the Complaints Assessment Committee**

**Complaint No: C27720**

In the matter of                    **Part 4 of the Real Estate Agents Act 2008**

Licensee 1:                         **Geraldine Hermens (10015203)**

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Decision finding of unsatisfactory conduct including orders

10 May 2019

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**Members of Complaints Assessment Committee: CAC520**

**Chairperson:                    Bernardine Hannan**

**Deputy Chairperson:        Peter Brock**

**Panel Member:                Craig Edwards**

# **Complaints Assessment Committee**

## **Decision finding unsatisfactory conduct including orders**

### **1. The Complaint**

- 1.1. On 10 September 2018, the Real Estate Agents Authority (the Authority) received a complaint against Geraldine Hermens (the Licensee) from the Complainants.
- 1.2. The Licensee is a licensed Salesperson under the Real Estate Agents Act 2008 (the Act) and at the time of conduct was engaged by Wayne Graham Realty DN Ltd t/a LJ Hooker Dunedin (the Agency).
- 1.3. The complaint relates to a property situated at the Property.
- 1.4. The details of the complaint are that the Licensee misled the Complainants, advising them that the house did not contain scrim, that the third bedroom was a bedroom when it was smaller than stipulated in the Housing Improvement Regulations 1947, and that the cooktop was an induction unit when it was a ceramic.
- 1.5. In particular, the Complainant advised that:
  - a) They wanted to ensure the house they purchased did not have scrim.
  - b) They had building and electrical inspections completed as a condition of sale.
  - c) The builder's report noted there was no visible scrim and the wall linings were in good condition. The electrical report found scrim behind the switchboard. The electrician advised the Complainants should check further.
  - d) On 5 March 2018, the day before their offer went unconditional, they emailed the licensee asking, "Are the owners aware of any scrim in the house?". They received an email response from the Licensee saying, "There is no scrim in the house."
  - e) On 6 March 2018, the agreement became unconditional. The agreement included a discount price of \$3000 to remove the scrim behind the switchboard and address other issues identified in the building report.
  - f) After moving in, they thought they could see signs of scrim in the walls. A builder engaged to inspect the walls found scrim behind approximately 50% of the wall linings in the house.
  - g) They raised their concerns with the Agency. The Agency sales manager said the Licensee did not know if there was scrim in the walls or not, and the Licensee had made her statement purely by looking at the walls.
  - h) The Property was advertised as a three-bedroom property. When they moved in they realised one of the rooms is 5.2 m<sup>2</sup>, and therefore, smaller than the minimum required for a bedroom under the Housing Improvement Regulations 1947. They say the advertising was misleading.
  - i) The cooktop was described on the chattels list as an induction cooktop. The Complainants say when they moved in, the cooktop was a ceramic cooktop. The Licensee told the Complainants that the seller had thought the cooktop was an induction cooktop.

- j) The Complainants say the matter involving the cooktop was successfully resolved, however, they are concerned the Licensee initially tried to settle the issue by appearing to be untruthful.
- 1.6. The Complainant requested a remedy, being:
- a) The Licensee to pay \$21,761.57 for the removal of the scrim and relining the walls.
- 1.7. The Licensee responded to the complaint against her.
- 1.8. In particular, the Licensee commented that:
- a) She received an email on 5 March 2018 from the Complainants asking, 'Are the owners aware of any scrim in the house?'
  - b) She interpreted this to mean 'Are the purchasers aware of scrim on the walls'. There was no scrim on the walls and she was absolutely certain of this, as it was the second time in two years she had sold the Property. All the wall linings were a hard surface, and there was no scrim on the walls. It did not occur to her the Complainants were referring to scrim behind the walls.
  - c) During the marketing of this property in 2015 and 2017, at least 3 builders inspected the property (in addition to the Complainants' building inspector) and never mentioned that scrim was identified.
  - d) She could not have known if there was scrim behind the walls without conducting invasive testing.
  - e) The first she knew there was scrim behind the switchboard was at the time of confirmation, when the Complainants requested a reduction in the purchase price because scrim together with other issues was identified in pre-purchase building and electrical inspection reports undertaken by the Complainants.
  - f) She asked the vendor if he knew there was scrim behind the switchboard. The vendor confirmed that he didn't know until communication about this between the lawyers.
  - g) The vendor agreed to a price reduction requested by the Complainant due to the presence of exposed scrim and timber behind the switchboard. The issue with scrim was resolved through this means.
  - h) She was surprised to hear from the Complainants later regarding scrim, seeking compensation from her for replacement of their walls. Attempts to resolve the scrim issue have not progressed.
  - i) The size of the third bedroom was never raised with her until the complaint was laid with the Authority. It was not raised as an issue in the Complainants builder's report.
  - j) In the marketing material, the bedroom was described as it is described in the Dunedin City Council LIM Report, which clearly states that the room is a bedroom.

## **2. What we decided**

- 2.1. On 23 October 2018, the Complaints Assessment Committee (the Committee) considered the complaint and decided to inquire into it under Section 79(2)(e) of the Act.
- 2.2. On 13 March 2019, the Committee held a hearing on the papers and considered all the

information that had been gathered during the inquiry.

- 2.3. The Committee found the Licensee has engaged in unsatisfactory conduct under section 89(2)(b) of the Act. The decision was also made with reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. 5.1 (skill, care etc), 5.2 (sound knowledge etc), 6.2 (act in good faith etc), 6.3 (must not mislead etc).

### **3. Our reasons for the decision**

The Committee found, pursuant to Section 72 of the Act, that the Licensee's actions breached Rule 6.3 (must not mislead).

#### **Licensee's Statement Regarding Scrim**

- 3.1. By way of background, scrim is a woven fabric, made from a natural fibre such as flax, used in home wall construction, and was common in some areas in the late 19th and early 20th century. Scrim can also refer to the type of construction generally where walls, lined internally with sarking (rough sawn timber) are covered with scrim which is usually later lined with wall paper. Scrim is less desirable than alternative wall lining systems due mainly to the higher fire risk and poor/instable surface, particularly when coated with multiple layers of wall paper.
- 3.2. The evidence shows that the Complainant asked the Licensee in an email on the evening of 5 March 2018 'Are the owners aware of any scrim in the house?'. The Licensee replied 10 minutes later with 'There is no scrim in the house.'
- 3.3. The Committee notes that the Complainants were aware of the electrician's report which identified the presence of scrim behind the switchboard when they asked the Licensee the question about scrim.
- 3.4. The Complainants says that they took the Licensee's response to be an assurance that any scrim must have been removed from the house prior to it being relined (except, of course, the area behind the switchboard). They assumed the Licensee must have had some knowledge of this to have been able to provide such an assurance.
- 3.5. The Licensee says she had no way of knowing whether any scrim on previous wall linings had been removed prior to relining, only that the house had been relined, and therefore, did not have scrim on the walls. She says she would not have been able to know whether scrim existed under the new linings without invasive testing.
- 3.6. The Committee notes that the Complainant's question was an enquiry as to the vendor's knowledge about scrim in the house. The Licensee's response didn't address the question as to the vendor's knowledge directly, but instead, provided an assertion which clearly sought to set the Complainants' minds at rest. The Committee accepts that this statement was based on the knowledge the Licensee had about the Property at the time, and that it is unlikely the question was put directly to the vendor.
- 3.7. The Licensee contends that her statement was not intended to report on any scrim beneath the relined walls, only what would have been visible. The Committee notes that the Complainants did not seek to inform or correct the Licensee with the knowledge they had of the scrim found by the electrician behind the switchboard. Had they done so at the time, it is very likely that clarification by the Licensee of what she meant by her statement and what she knew (and was not in a position to know), might well have resolved the matter satisfactorily at that time. That is not what happened though, and the statement made by the Licensee in the

absence of any clarification or qualification was incorrect and misleading.

- 3.8. Accordingly, on the issue of the Licensee's statement regarding scrim, the Committee finds the Licensee breached Rule 5.1 (skill, care and competence) and Rule 6.4 (not mislead) and has engaged in unsatisfactory conduct.

### **Induction Cooktop**

- 3.9. The Committee is satisfied that the Licensee prepared the Agreement for Sale and Purchase form (Agreement) and included "induction cooktop" in the chattels list. This Agreement was signed by both parties, and the vendor claims not to have noted or questioned the description of the cooktop in the Agreement before signing.
- 3.10. The Licensee claims her understanding of the type of cooktop installed was based on the previous agreement when the vendor bought the property, and the existing appliance was to have been replaced with an induction unit. The vendor claims not to recall this and expressed disappointment that the chattel description turned out to be inaccurate.
- 3.11. The Committee is of the view that a licensee engaging in best practice would have checked to ensure the description in the chattel list was accurate, and would have sought clarification, if necessary, from the vendor. That this did not occur does not automatically mean the threshold of unsatisfactory conduct has been met.
- 3.12. The Committee has also considered in this case that the remedy provided by the Licensee and the vendor fully mitigated the Licensee's error. The provision of a new induction unit at the cost of the Licensee and vendor has placed the Complainants in no worse position than they would have been had the cooktop been accurately described as what it was, a ceramic cooktop, or been of a type that met the description in the Agreement, which it now does.
- 3.13. The Committee has, therefore, concluded that the Licensee's conduct in respect of the description of the cooktop in the chattels list does not meet the threshold of unsatisfactory conduct, and the Committee has determined to take no further action on this issue.

### **Bedroom Size**

- 3.14. The Complainants' claim that the 3<sup>rd</sup> bedroom should not have been represented to them as a bedroom because its size is less than the minimum required for a bedroom in the Housing Improvement Regulations 1947 (Regulations). The Committee does not agree that the Licensee's description of the space was misleading.
- 3.15. The issue raised by the Complainants is that the 3<sup>rd</sup> bedroom was only 5.2 square meters. The Licensee has not disputed this assertion, so the Committee proceeds on the basis the bedroom is 5.2 square meters. The Committee interprets the Complaint to be because the bedroom is less than 6 square meters, it is in breach of the Regulations, and because it is in breach of the Regulations, it is a misrepresentation and misleading to refer to it as a bedroom.
- 3.16. The Regulations specify that "Every bedroom shall have an area of not less than 6 sq m..." and "...provided that in an existing house a room with an area of less than 6 sq m but not less than 4.5 sq m may be occupied as a bedroom by a person under 10 years of age." The Regulations are not unequivocal and a bedroom less than 6 square meters in size does not necessarily contravene the Regulations.
- 3.17. The Licensee's description of the room as a bedroom is consistent with the LIM report and the

building plans which record it as a three-bedroom house and show the space as a bedroom.

- 3.18. The Complainants do not say the space was not being used as a bedroom, or that it was not capable of being used as a bedroom and had the opportunity to inspect the Property and make their own determination as to the size and suitability of the third bedroom for use as a bedroom. There is no suggestion the Licensee misled the Complainants as to the actual size of the room.
- 3.19. In the circumstances, the Committee does not consider referring to the third bedroom as such is incorrect or misleading.
- 3.20. Accordingly, the Committee has determined to take no further action on this matter.

#### **4. Orders**

- 4.1. Having made a finding of unsatisfactory conduct against the Licensee, the Committee decided to make the following orders pursuant to Section 93 of the Act:
  - a) No order.

#### **5. Our reasons**

- 5.1. The Committee has determined to make no order in this case for the following reasons.
- 5.2. The Licensee has been found to have engaged in unsatisfactory conduct by making an incorrect and misleading statement that there was no scrim in the house.
- 5.3. The Committee, however, considers this breach to be minor in the context of the circumstances of the conduct including the following matters.
- 5.4. The Complainants were aware that scrim had been found behind the switchboard. They did not inform the Licensee of this when they asked her if the vendor was aware of any scrim in the house. If they had, her answer to the question asked may well have been different or qualified by her.
- 5.5. Also, the fact the electrician found scrim behind the switchboard must have put the Complainants on notice of the risk of unseen scrim being elsewhere in the house.
- 5.6. The Complainants seek a remedy being the cost of removing the scrim from their walls. They initially feared the scrim was a fire risk and a safety issue, but after further inquiry their primary concern is that failing to remove scrim when the Property was relined is an indication of poor workmanship. The Committee infers from this a concern by the Complainants that the presence of scrim will impact on value or salability when the Complainants sell the Property.
- 5.7. The Committee's power to make orders is set out at Section 93 of the Act. The Committee has no general power to award compensation. It has a specific and limited power to order a licensee to rectify an error or omission or, if it is not possible to do so, then to provide "... relief, in whole or in part, from the consequences of the error or omission ...".
- 5.8. Loss of value due to negligence by a licensee, including loss on resale, is outside the limited and specific power a Committee has to compensate a complainant. This is made very clear in the High Court decision of *Quin v REAA*.
- 5.9. The Licensee's error was to say there was no scrim in the house. Her error cannot be rectified because the Complainants purchased the Property with scrim in the house. The consequence

of the omission was that the Complainants purchased the Property when they might not otherwise have done so. The Licensee offered to purchase the Property back from the Complainants at what they paid for it plus their legal costs. This is very similar to the situation in *Quin* (supra) where the purchasers (respondents in the High Court litigation) where there was a misrepresentation about the location of a boundary elected to keep the property, and they incurred extra costs to build what they wanted to build on the property. The High Court said the consequence of the error was being deprived of the opportunity not to purchase the property – not the costs of the extra building works.

- 5.10. Using the *Quin* (supra) methodology, the cost of removing the scrim is not a consequence of the incorrect representation that there was no scrim in the house.
- 5.11. Even if the cost of removing the scrim was a consequence of the Licensee's error, the Committee would not exercise its discretion to order rectification in favour of the Complainants in the circumstances of this case, primarily because they were on notice as to the existence of hidden scrim in the house, and they did not inform the Licensee of scrim being found behind the switchboard when they asked her if the vendor was aware of any scrim in the house.
- 5.12. Therefore, in consideration of these factors the Committee has determined that the Licensee's error is a minor breach, and the finding of unsatisfactory conduct is sufficient in this case to meet the objectives of the Act in determining penalty.

### **Principles considered**

- 5.13. When determining whether or not to make an order under Section 93(1), the Committee has also had regard to the functions which the imposition of a penalty usually must serve in professional disciplinary proceedings.
  - (a) promoting and protecting the interests of consumers and the public generally (section 3(1))
  - (b) maintaining professional standards
  - (c) punishing offences
  - (d) rehabilitating the professional.
- 5.14. The Committee acknowledges that, when making an order under Section 93, the order/s made must be proportionate to the offending and to the range of available orders.

### **Promoting and protecting the interests of consumers and the public**

- 5.15. Section 3(1) of the Act sets out the purpose of the legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."
- 5.16. One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (Section 3(2)).

### **Maintaining professional standards**

- 5.17. This function has been recognised in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings: *Taylor v The General Medical Council* (1990) 2 A11 ER 263; and in disciplinary proceedings involving valuers: *Dentice v The*

*Valuers Registration Board (1992) 1 NZLR 720.*

- 5.18. Although different professions use different descriptions of the nature of the unprofessional or incompetent conduct that will attract disciplinary charges, there is a common thread of scope and purpose. The aim is to enforce a high standard of propriety and professional conduct. Professions seek to:
- make sure that no person unfitted because of his or her conduct is allowed to practise the profession in question
  - protect both the public and the profession itself against persons unfit to practice
  - enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.
- 5.19. In the Committee's view, maintaining professional standards is also a function of the disciplinary processes under the Act.

### **Punishment**

- 5.20. The Committee accepts that a penalty in a professional discipline case is primarily about maintaining standards and protecting the public. However, in the Committee's view there is also an element of punishment – indicated by the power the Committee has to impose a fine (Section 93(1)(g)); or make an order of censure (Section 93(1)(a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (*see Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, CIV 2007-404-1818 Lang J 13 August 2007)).
- 5.21. At paragraph [27]-[28], the judge said:
- “Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter both the offender and others in the profession from offending in a like manner in the future. I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed...”

### **Where appropriate, rehabilitation of the professional must be considered**

- 5.22. The Committee regards its power to make an order requiring a Licensee to undergo training or education (Section 93(1)(d)) as indicating that rehabilitation is a function of professional disciplinary processes under the Act.

## **6. Your right to appeal**

- 6.1. If you are affected by this decision of the Committee, the right to appeal is set out in section 111. You may appeal in writing to the Real Estate Agents Disciplinary Tribunal (the Tribunal) within 20 working days after the date notice is given of this decision. Your appeal must include a copy of this decision and any other information you wish the Tribunal to consider in relation to the appeal. The Tribunal has a discretion to accept a late appeal filed within 60 working days



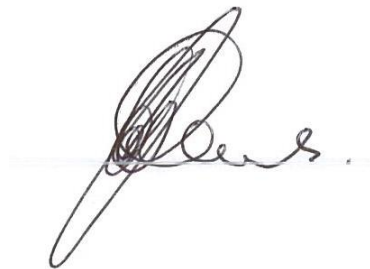
after the date notice is given of this decision, but only if it is satisfied that exceptional circumstances prevented the appeal from being made in time.

- 6.2. For further information on filing an appeal, read [Guide to Filing an Appeal](https://www.justice.govt.nz/tribunals/real-estate-agents/) on the Real Estate Agents Disciplinary Tribunal website (<https://www.justice.govt.nz/tribunals/real-estate-agents/>).

## **7. Publication**

- 7.1. The Committee directs publication of its decision. The decision will be published without the names or identifying details of the Complainant (including the address of the Property), and any third parties. The decision will state the name of the Licensee and the Agency for which they work or worked for at the time of the conduct.
- 7.2. The Authority will publish the Committee's decision after the period for filing an appeal has ended, unless the Tribunal receives an application for an order preventing publication. The Authority will not publish the Committee's decision until the Tribunal has made a decision on the application.
- 7.3. Publishing the Committee's decision supports the purpose of the Act by ensuring that the disciplinary process remains transparent, independent and effective. The Committee also considers that publishing this decision helps to set standards and that is in the public interest.

Signed

A handwritten signature in black ink, appearing to read 'Craig Edwards', written over a horizontal line.

**Craig Edwards**

**Panel Member**

For Complaints Assessment Committee 520

Date: 10 May 2019

## Appendix: Relevant provisions

The Real Estate Agents Act 2008 provides:

### **89 Power of Committee to determine complaint or allegation**

- (1) A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.
- (2) The determinations that the Committee may make are as follows:
  - (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal;
  - (b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct;
  - (c) a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.
- (3) Nothing in this section limits the power of the Committee to make, at any time, a decision under section 80 with regard to a complaint.

### **72 Unsatisfactory conduct**

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

### **93 Power of Committee to make orders**

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
  - (a) make an order censuring or reprimanding the licensee;
  - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint;
  - (c) order that the licensee apologise to the complainant;
  - (d) order that the licensee undergo training or education;
  - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint;
  - (f) order the licensee:
    - (i) to rectify, at his or her or its own expense, any error or omission; or
    - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission;
  - (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company;

- (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order;
  - (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
- (2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

#### **111 Appeal to Tribunal against determination by Committee**

- (1) A person affected by a determination of a Committee may appeal to the Tribunal against a determination of the Committee within 20 working days after the date of the notice given under section 81 or 94.
- (2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by—
  - (a) a copy of the notice given to the person under section 81 or 94; and
  - (b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.
- (3) The appeal is by way of rehearing.
- (4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.
- (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

The relevant provisions from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 are:

- Rule 5.1** A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- Rule 5.2** A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.
- Rule 6.2** A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- Rule 6.3** A licensee must not engage in any conduct likely to bring the industry into disrepute.